UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VXI GLOBAL SOLUTIONS, LLC

and Case 08-CA-133514

ANZEL MILINI, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF TO BOARD

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ISSUES PRESENTED

I. Whether Respondent's MAA is overly broad that employees could reasonably believe that they were prohibited from filing charges, or seeking other redress, with the National Labor Relations Board in violation of Section 8(a)(1) of the Act?

II. Whether Respondent, by its maintenance of its various pleadings in the Court of Common Pleas for Mahoning County, the Ohio Seventh Appellate District, and before the American Arbitration Association, is enforcing an unlawful policy requiring employees to waive the right to pursue class or collective claims in violation of Section 8(a)(1) of the Act?

INTRODUCTION

On September 30, 2015, the parties to this case, Respondent VXI Global Solutions, LLC, Charging Party Anzel Milini, and the General Counsel filed a joint motion and stipulation of facts under Section 102.35(a)(9) of the Board's Rules and Regulations. On February 29, 2016, the Board granted the parties' motion, ordered the proceeding be transferred, and permitted the parties to file briefs in support of their respective positions which they did on March 21, 2016. Counsel for the General Counsel now files this answering brief pursuant to the February 29 order and Section 102.35(a)(9) of the Board's Rules and Regulations.

RESPONDENT'S ASSERTED ARGUMENTS

In its March 21 brief to the Board, Respondent asserts that the General Counsel's arguments are flawed because: (1) the Board's decisions upon which they are based are in conflict with the Federal Arbitration Act (FAA) as interpreted by the Supreme Court; (2) the Charging Party waived her rights under the NLRA; (3) Respondent's MAA cannot reasonably be interpreted, and has not been applied, to prevent employees from filing NLRB charges; and (4) Respondent's state court filings and before the American Arbitration Association to seek individual arbitration of wage claims are proper. (R. Brief at 1.)

Although Respondent recognized in its brief that the Board has issued numerous decisions over the past several months invalidating arbitration agreements in a variety of contexts, Respondent contended the Board's rationale in these decisions is "based upon the same flawed premise underlying *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB 72 (2014)[.]" (R. Brief at 4.) Respondent asserted that not only was the

Board's rationale directly overruled by the Fifth Circuit, but it is "contrary to Supreme Court precedent and has been flatly rejected" by numerous federal and state courts. (R. Brief at 4.) Respondent suggested that the Board use the instant case as a "compelling opportunity to bring its jurisprudence into line with controlling authority when a party abuses the Board's unfair labor practice machinery for tactical gain in unrelated litigation." (R. Brief at 4.)

In answer to Respondent's assertions, Counsel for the General Counsel initially points out that the rationale in *D.R. Horton* and *Murphy Oil* is based on sound NLRA jurisprudence which is well articulated in both decisions. Consequently, Counsel for the General Counsel will address only some of Respondent's points and authorities which deviate from or misstate this jurisprudence. Concerning Respondent's suggestion that the Board use the instant case to revisit its rationale because the Charging Party has abused the Board's processes, Counsel for the General Counsel reminds Respondent that it is the one charged with violating the Act and not the employees who have merely sought to exercise their Section 7 rights by taking collective action to insure the proper payment of their wages.

1. The Board Decisions Are in Accord with The FAA

A. The Supreme Court's Enforcement of Arbitration Agreements under the FAA

Enacted initially in 1925, and then reenacted and codified in 1947 at 9 U.S.C. § 1 *et seq*., the Federal Arbitration Act's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). While the U.S. Supreme Court has reviewed the applicability of the FAA to state and federal judicial and statutory law, it has

never squared the conflicting policy provisions of the FAA and the NLRA. Specifically, the Court has never considered the issue of whether a collective action can be precluded under a mandatory arbitration agreement when it relates to employees' terms and conditions of employment in the private workplace. In support of its argument that the instant collective arbitral action is not allowed under the parties' "Mutual Agreement to Arbitrate Claims" (the MAA), Respondent cited to a few employment-related Supreme Court's decisions. However, none of these cases directly address the issue at hand.

For instance in *Gilmer*, the issue involved whether an individual's registration application under the New York Stock Exchange, which included a clause to arbitrate any controversy arising out of his employment, could preclude him from pursuing a federal age discrimination case in district court. 500 U.S. 20. Concluding in the affirmative, the Court found that there was nothing in the text or the legislative history of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621 et seq., nor was there any "inherent conflict" that precluded arbitration of his statutory claim. 500 U.S. at 26. Similarly in *14 Penn Plaza v. Pyett*, 556 U.S. 247 (2009), the Court found the "clear and unmistakable" waiver language in a collective bargaining agreement required arbitration, in lieu of court litigation, of bargaining unit employees' ADEA claims.

In another case cited by Respondent, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the Court merely reviewed the issue of whether employment contracts were actually governed by the FAA. Determining that they were, the Court explained that the exemption language found under Section 1 of the FAA was confined to employment contracts for transportation workers. Thus, an individual's employment discrimination suit that had been filed in state court could be stayed under Section 3 of the FAA, and arbitration could be compelled as

the individual's application for employment at the retail store chain required that all employment disputes be settled by arbitration.

Respondent also relied on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) which involved a choice-of-forum issue involving a foreign automobile manufacturer seeking to enforce an arbitration provision of a distribution and sales agreement against a Puerto Rican car dealership. In this non-employment case, the Court found that the dealership's anti-trust claims brought under the Sherman Act, 15 U.S.C. § 1 *et seq*., could be arbitrated both under the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Convention of 1970, 21 U.S.T. 2517 . See also *CompuCredit Corp. v. Greenwood*, __U.S.__, 132 S. Ct. 665 (2012)(respondents' credit card agreement required binding arbitration of claims brought under the Credit Repair Organizations Act); *Rodriquez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 477 (1989)(resolution in a judicial forum of investors' claims for securities fraud is not required as predispute agreement to arbitrate claims under Securities Act of 1933 is enforceable).

In none of these cases cited by Respondent was the issue presented that individuals could not bring collective claims under the respective statutes. Notwithstanding Respondent did cite two more recent Supreme Court cases, which unlike the case at hand, addressed the issue of explicit class-action waivers found in arbitration agreements. But again these cases did not involve employment-related situations. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Court found that customers' class action against a telephone company concerning fraudulent offers of free cell phones was not permitted under the terms of the parties' consumer contracts prohibiting classwide arbitration. The Court held that a California judicial rule, which had been applied by the Ninth Circuit, concerning the unconscionability of class arbitration

waivers in consumer contracts was pre-empted by the FAA. Similarly in *American Express Co. v. Italian Colors Restaurant*, __U.S.__, 133 S. Ct. 2304 (2013), the Court reversed the Second Circuit's finding that the FAA did not permit the courts to reject a specific class-arbitration waiver found in a merchants' agreement because costs of pursuing individual federal anti-trust claims would exceed any amounts recovered.

B. The Congressional Command of the NLRA

While the cases cited by Respondent are not factually controlling, the cases do provide insight as the Court has repeatedly recognized the FAA's principle purpose is to enforce arbitration agreements according to their contractual terms. *Italian Colors*, 133 S. Ct. at 2309. However "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628). In applying the FAA to cases involving federal statutory claims, the Court has repeatedly acknowledged that the mandate of the FAA can be outweighed by a contrary congressional command which precludes the FAA's application in favor of statutory rights. *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987)(claims under § 10(b) of the Securities Exchange Act and RICO could be arbitrated). "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.*, (quoting Mitsubishi, 473 U.S. at 629).

In the instant analysis, the federal statute for which the Charging Party seeks a remedy involves the Fair Labor Standards Act (FLSA) of 1938. 29 U.S.C.§ 201, *et seq*. But whether

statutory claims brought under the FLSA can be mandated by the FAA to arbitration via the enforcement of an arbitration provision is not the case to be decided by the Board. Rather the case to be decided involves the indirect application of the substantive rights found under the NLRA. The indirect application of the NLRA does not challenge the basic precept of the FAA that federal policy favors arbitration. Rather the application of the NLRA is at odds with any attempt to prevent private sector employees from engaging in all collective actions to adjudicate work-related claims regardless of the forum. The "inherent conflict" between the FAA and the NLRA is the NLRA itself.

Section 7 provides that "[e]ployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157. In *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), the Supreme Court examined the meaning of the "mutual aid and protection" clause finding it encompasses employees "when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." 437 U.S. at 56. Thus to find, as Respondent maintained, that Section 7 "does not contemplate, let alone clearly protect, a substantive right to class or collective actions" is to completely invalidate the Court's *Eastex* decision which Respondent failed to even mention, let alone discuss, in its brief.

In rejecting a narrow interpretation of the "mutual aid and protection" clause, the *Eastex* Court considered the Congressional intent of the statute:

> The 74th Congress knew well enough that labor's cause often is advanced on fronts other than collective bargaining an grievance settlement within the immediate employment context. It recognized this fact by choosing, as the language of § 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid or protection' as well as for the narrower purposed of 'self-organization' and 'collective bargaining.' Thus, it has been held that the `mutual aid or protection' clause protects employees from retaliation by their

> employers when they seek to improve working conditions through resort to administrative and judicial forums, and that employees' appeals to legislators to protect their interests as employees are within the scope of this clause. To hold that activity of this nature is entirely unprotected-irrespective of location or the means employed-would leave employees open to retaliation for much legitimate activity that could improve their lot as employees. As this could 'frustrate the policy of the Act to protect the right of workers to act together to better their working conditions,' *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 14 (1962), we do not think that Congress could have intended the protection of § 7 to be as narrow as petitioner insists.

437 U.S. at 565-67 (internal footnotes omitted).

The "mutual aid and protection" clause is also found under Section 1 of the Act in which Congress directly expressed its findings made prior to the enactment of the statute. Congress wrote, *inter alia*:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affect the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

29 U.S.C. § 151.

Congress also reemphasized its deliberations when it expressed the Government's declared labor policy which is also found in Section 1 of the Act:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151.

In its brief, Respondent cited to the Fifth Circuit's decision in *Murphy Oil*, 808 F.3d, 1013, 1018 fn. 3 (5th Cir. 2015), in which the court "noted that several other circuit courts have either indicated or expressly stated they would agree with its holding in *D.R. Horton* if faced with the same question." (R. Brief at 9.) However in reviewing the decisions cited in Respondent's brief, as well as the Fifth Circuit's decisions in *D.R. Horton,* 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil*, *supra*, it is clear that the courts gave short shrift, if any attention at all, to the Board's analysis and to the NLRA itself. None of the decisions cited considered the Congressional findings and policy as stated in Section 1 of the Act.

Additionally, Counsel for the General Counsel notes that the full "freedom of association," which is inherently part of the Congressional mandate of Section 1 of the Act, has been interpreted by the Supreme Court to fall within the protection of the U.S. Constitution. The "Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 543 (1963).

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment . . . . *NAACP v. Alabama,* 357 U.S. 449, 460 (1958). The Supreme Court declared this right to be protected against both intentional and incidental infringement. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action. *Id.* at 461.

First National Bank, Englewood v. United States, 701 F.2d 115, 117 (1983)(internal quotations omitted).

See Louisiana v. NAACP, 366 U.S. 293 (1961)(freedom of association is included in the bundle of First Amendment rights).[1] *See also Office Employees Local 29 (Dameron Hospital Assn.)*, 331 NLRB 48 (2000)(Brame dissenting)("Congress has charged the Board with protecting and enforcing the rights accorded employees under the Act, inter alia, to engage in or refrain from union activities. These rights are the equivalent in the statutory scheme of the NLRA to the constitutional rights of free speech, freedom of association, and liberty that courts have protected in cases involving public employment or employment under the RLA through the application of statutory or constitutional principles."); and *Caterpillar, Inc*. 321 NLRB 1178 (1996)(Gould concurring)("The National Labor Relations Act, which contains a policy commitment to the promotion and practice of the collective-bargaining process as well as freedom of association through concerted activity, contains, as its central element, the right of all employees to protest and to speak up so as to alter and affect their employment conditions.").

C. The NLRA and the FAA's Savings Clause

The savings clause found in Section 2 of the FAA provides that arbitration agreements are "enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Relying on language found in *AT&T Mobility LLC v. Concepcion*, 563

[1] In *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576 (1971), the Court reversed a state court injunction barring railroad union from receiving compensation for providing legal representation to members and their families to seek damages under the Federal Employers' Liability Act. (45 U.S.C. §§ 51-60).

> In the context of this case we deal with a co-operative union of workers seeking to assist its members in effectively asserting claims under the FELA. But the principle here involved cannot be limited to the facts of this case. At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decision in NAACP v. Button, [371 U.S. 415 (1963], [Railroad] Trainmen [v. Virginia State Bar, 377 U.S. 1 (1964)], and United Mine Workers [of Am., Dist. 12 v. Illinois State Bar Assn., 389 U.S. 217 (1967)] is that collective activity to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.

United Transp. Union, 401 U.S. at 585.

U.S. 333 (2011), Respondent contended in its brief that the FAA's savings clause is inapplicable to the instant case because the clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." (R. Brief at 11.)

However in making its argument, Respondent failed to take into account the Supreme Court's long held doctrine that individual employment contracts conflicting with employees' Section 7 rights to "engage in concerted activities for the purpose of . . . mutual aid or protection" are unlawful. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944); and *National Licorice Co. v. NLRB*, 309 U.S. 350 361 (1940). To find to the contrary, that is employees' would have no rights to engage in collective litigation whether in the courts or through arbitration, would be to relinquish the substantive statutory rights which are at the heart of the Act.

II. The Issue of Waiver

Respondent maintained in its brief that by signing the MAA, the Charging Party had waived her right to engage in collective legal activity under Section 7. (R. Brief at 12.) Counsel for the General Counsel directs Respondent's attention once more to the fundamental principles as set forth by the Supreme Court in *J.I. Case* and *National Licorice, supra,* and their progeny. Respondent further maintains that in unionized settings parties frequently waive their right to engage in legal action in favor of arbitration. (R. Brief at 13.) In support, Respondent cites to *14 Penn Plaza v. Pyett,* 556 U.S. 247 (2009), wherein the Supreme Court determined that an

arbitration provision under a collective bargaining agreement precluded employees from bringing ADEA claims in court.

In making this assertion, Respondent fails to recognize two significant points. First, parties to a collective bargaining agreement seek to foster a relationship whereby disputes are handled in a quick and efficient manner pursuant to a grievance process which often has binding arbitration. Second, a union will not forego its right to bring a class action grievance on behalf of the employees' that it exclusively represents just by entering into a collective bargaining agreement that has a grievance procedure. In *Penn Plaza*, the employees did not lose their ability to bring a collective action. Rather, it was merely a matter of contract which dictated what forum within which the ADEA claims would be decided.

CONCLUSION

By its maintenance of the MAA, Respondent has violated Section 8(a)(1) of the Act as the MAA is overly broad in its mandate for arbitration of federal claims, thereby prohibiting employees from seeking redress before the Board. Respondent has additionally violated Section 8(a)(1) by its efforts to enforce its MAA against employees by asserting in both judicial and arbitral forums that the MAA prohibits employees from engaging in all types of class action claims.

Wherefore, Counsel for the General Counsel respectfully requests that an order be issued

consistent with Board law, and as requested in the Complaint and Notice of Hearing that issued on April 29, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing General Counsel's Answering Brief to Board was served by e-mail on the following counsel on this 4th day of April, 2016:

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